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INLAND WATER-COURSES.

Disputes are very frequent as to water-courses, as the origin of the word 'rivals' in the English language indicates. Yet, in India, there has till now been no legislative enactment defining the rights of owners in water flowing through their land, nor have judicial decisions gone far in defining these rights. The Easements Act of 1882 (which is applicable only to Madras, Central Provinces and Coorg) provides, indeed, for the creation, transfer and extinction of easements which are more or less restrictions of natural rights, but as to what these rights are in flowing waters, the legislature is silent. The illustrations to some of the sections of the Act no doubt throw some sidelight on the question, but for the body of the law we have still to look to English decisions.

2. According to English law, water-courses are divided into two classes—*natural* and *artificial*. The former are again divided into *tidal navigable* and *private*. It is proposed to define these with some precision.

A *water-course* consists of bed, banks and water. The bed is covered by the water and contains the water at its fullest when it does not overflow its banks, *i.e.*, it forms the soil below the high water-mark either of the ordinary tides or of the ordinary floods. The *bank* is consequently the outermost part of the bed in which the river naturally flows. The *water* covers the bed, and the one cannot be owned without touching the other. A water-course, in order that it may be the subject of riparian or other rights, must have a defined course, *i.e.*, it must flow in a fixed direction and by a regular channel with banks or sides. Those occasional outbursts of water, which in times of freshet, or melting of ice and snow, descend from the tops of hills and flood the country round, are not

water-courses. On the other hand, it is not necessary that they should flow continuously. In the words of Bartlett, J., "It is not essential to a water-course, that the banks should be absolutely unchangeable, the flow constant, the size uniform, or the water entirely unmixed with earth or flowing with any fixed velocity; but the law does not and cannot fix the limits of variation in these particulars."—*Rassett v. Salisbury Manuf. Co.*, 43 *N. H.*, 569, 578. In other words, the decision of the question, whether a certain stream is a water-course or not, will depend upon the circumstances of each case.

The passage last quoted shows that current is also a material requisite of a water-course; but this alone will not convert a lake into a river; for instance, there are lakes in which there exist currents in the surface water flowing from a higher to a lower level, and discharging into a river or marsh; but these are not water-courses.

3. A *natural* water-course may be defined as a body of water issuing *ex jure naturæ* from the earth, and by the same law pursuing a certain direction in a defined channel till it forms a confluence with the sea, or joins another body of water or flows into a lake or marsh. It matters not whether the water flows and reflows, or has its current only one way. Rights attach to a water-course at its very source,* *i.e.*, the point where the waters rise to the surface; so, the interception of water at its very source by the person on whose land the spring rises is as much actionable as any other diversion of the water lower down.(a) The point of termination is not very material for legal purposes. It is generally the place where the waters mingle with the sea or other body of water.

Underground channels that run in a known and defined course stand on precisely the same footing as surface channels.†

* From an examination of the cases, it would appear that the source is the point where the water begins to flow in well-defined channel where such channel does not begin at the very springhead.

(a) *Dudden* v. *The Guardians of Chetten-Union*, 11 Ex. 627.

† A natural stream is defined in the Indian Easements Act, as "a stream whether permanent or intermittent, tidal or tideless on the surface of land or *under ground*, which flows by operation of nature only in a natural and known course."

But in all cases, whether the water is flowing above ground or underground, it is essential that it should flow in a defined course: else, no action can be maintained in respect of it.

4. As already stated, a natural water-course may be either *tidal navigable** or *private*. The distinction is one of some importance as it affects the rights of private individuals in the bed of the stream and their right to fishing. A *tidal navigable* water-course is one which is actually navigable, and in which the tide ebbs and flows. The line of demarcation of the common law between these two classes appears to be that at which the streams partake of the sea. The presence or absence of salt water is not, however, the criterion; the border line appears to be the place where a regular rise and fall under the influence of the tide becomes perceptible. (*Rice* v. *Miller*, 8 Q. B. D., 626.) The public may acquire a right to navigate in non-tidal, but navigable streams. Such a right will be in the nature of an easement.

According to Roman Law, all perennial rivers were *public* rivers, not in the sense that the ownership of the bed in the soil belonged to the State, but in the sense that they were intended for the use of the public, or in other words, they were subjected by the law to a kind of servitude in favour of all the members of the State. The distinction between *navigable* and *non-navigable* was not for defining the rights of private owners in the bed, but for determining the interdicts that would be applicable to any particular case. The bed of private rivers *always* belonged to the riparian owners. As to *public* rivers a distinction was made according to the nature of the land through which they flowed. Lands were: (1) *Agrii Limitatii*, *i.e.*, limited lands, *i.e.*, such as were acquired by conquest and distributed amongst the soldiery or granted to private individuals comprised within certain defined boundaries, or (2) *Agrii Artificinii*, *i.e.*, all lands bounded by natural limits, *e.g.*, rivers, mountains, &c. The ownership of beds in the former belonged to the State; in the latter, the older writers hold that it is private property, and the

* Angell divides natural streams into three divisions, viz., (1) where it is altogether private; (2) where it is private and at the same time subject to public use; and (3) where the use and property are both public. But the rights of the public in class (2) are in England in the nature of easements which the public may acquire when the stream is boatable. (*Orr Ewing et al Colquhoun et al* 2, App. C. 839.)

more recent ones hold that so long as it is covered with water it is *res nullius*. (Tagore Law Lectures, 1889, pp. 98—103.)

4 (*a*). In England rivers run but a short course, and are rarely navigable above tide-water; and hence the distinction above-mentioned was made. But in India, where the circumstances so much differ, it is a question whether the courts will follow the English law. In America, which is very much like India, there have been decisions diverging from the Common Law rule. The Continental States of Europe have not adopted it. Even here, there have been some decisions to the same effect, which may not, however, be conclusive —*Doe dem Seebkristo* v *The East India Company*, 6 M. I. A., p. 267, and *Nogender Chunder Ghose* v. *Mahomad Eusoff*, 18 Suth. W. R., 113.* In the latter case the Privy Council observed, "The learned Counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their lordships have no reason to suppose that in India, there is any such distinction as regards the proprietorship of the bed of the river." It may, therefore, be taken for granted that the more convenient law adopted by the Continental States would be followed here.

5. It is hardly necessary to define what *artificial* water-courses are. They generally owe their origin to artificial means, and are not natural bodies of water flowing *ex jure* natural from the earth.

6. *Bed of the stream.*—The bed of private rivers belongs to the proprietors of the land on either side, and in public ones it is vested in the Crown. The Crown is, however, rather a trustee for the public, and cannot use the bed in such a way as to militate against the rights of the public to free navigation and to fishery. This right of the Crown is limited to the *alveus* of navigable rivers up to the line of ordinary high-water mark; and beyond the line the land belongs to adjoining owners. A gradual and imperceptible diversion of the course will not take away the right of Government in the bed, but a sudden change will.

The right of owners of land adjoining private streams is this: Each owner is *primâ facie* owner of the soil of the *alveus* or bed of

* *Vide* also *Ramalakhuamma* v. *The Collector of Godavari*, V. L. J., 244; *Secretary of State for India* v. *Kadir Kutti and others*, I. L. R., 13 M., 369, and other cases decided by the Madras High Court. Muthusami Iyer, J., was of opinion that the English Law was binding until its operation was expressly excluded.

the river, *ad medium filum aquæ*. This right cannot be said to be a natural one, as it is based, more or less, on a grant, express or presumed. Evidence to the contrary may take away the right. The conveyance of a piece of land described as bounded by the river on one side, conveys also the bed of the river up to the midstream adjoining, even though without it the land conveyed is of the extent mentioned in the conveyance. Appurtenant to the right in the soil of the bed is the right to fishing which also extends up to the middle of the stream.

7. *Water—Public rivers.*—A tidal navigable river, the whole breadth of it, is a highway for the use of all Her Majesty's subjects. But the use should be a reasonable one. The public have also certain accessory rights, *i.e.*, such as are necessary for the convenient passage of vessels, *e.g.*, the right of stopping for a reasonable time to unload, and of grounding and anchoring, free of toll. An obstruction to the right of navigation being a public nuisance, no prescriptive right can be acquired thereto. Nor can such obstruction be justified by a license from the crown. The banks of rivers are not *publici juris*, and the public cannot, therefore, claim a right, except it be by custom, to landing and towing thereon. The Roman law was, however, different, and would perhaps be followed in India in preference to the Common Law.

The rights of riparian owners as such in tidal navigable rivers are not extinguished, but are only subordinated to the rights of the public. In the case of non-tidal but navigable streams, in which the public have acquired a right to navigate, the interest of the public is subordinated to that of private individuals. An owner on the banks of a navigable river has, however, the important and additional right of access from his land to the river for the purpose of exercising the public right of navigation, which is quite distinct from the similar public right.

8. *Water—Natural rights of riparian owners in private streams.* It was explained by *Lord Wensleydale*, in *Chasemore* v. *Richards*, 7 H. L., 374, that the right to the enjoyment of a natural stream of water on the surface is a natural incident to the right to the soil itself, and that the owner is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land. It was, however, at one

time maintained by high authorities that a right to the use of running water is not a right in property, that water was *publici juris*, and as such the right to use it is acquired by first occupancy. But this theory is long since exploded. "The right," says *Parke*, B., "to have a stream flow in its natural state, without diminution or alteration, is an incident of property in the land which it passes; but flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that, during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land"—*Embrey* v. *Owen*, 6 Ex. 353. From the above passage it will be clear that the right to the water flowing through one's land arises from the right of access to the stream and not from ownership in the soil. It consequently attaches to possession or enjoyment. Thus in *The First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*, I. L. R., 7 B., p. 209, it was decided that the usufructuary interest in a stream is incident to the possession of the adjacent soil and, consequently, the occupants of the land abutting on the stream and not the Government were entitled to the enjoyment and benefit of the water as it flows past. It may be mentioned in explanation that the land in that case was ryotwari and the Government, who were the owners, claimed the usufruct.

9. The rights in natural streams, as explained above, are inseparably connected with and inherent in the property in the land and are consequently *corporeal* in their nature. The rights in artificial streams are, however, *incorporeal*, as they can only be acquired by grant, actual or presumed, or by prescription. Rights similar to those in natural streams can be acquired in artificial ones under certain circumstances, but they will also be in the nature of easements.

10. Riparian proprietors have got the right to the flow of water through their lands *undiminished in quantity* and *undeteriorated in quality*. These rights will now be more fully explained.

"By the general law applicable to running streams," says Lord Kingsdown, "every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream" *Minor* v. *Gilmour,* 12 M. P. C., 131. 'Domestic purposes' includes culinary purposes, cleansing and washing, feeding and supplying the ordinary quantity of cattle, and so on. 'Brewing' would also appear to be a domestic use in England. But apart from this right to the ordinary use of water, every riparian proprietor has also the right to the use of water for any purpose, or what may be deemed the extraordinary use of it, *provided* he does not thereby interfere with the rights of other proprietors either above or below. This proviso is a very important one, and subject to it, the proprietor may dam up the water for the purpose of a mill or divert it for irrigation. The law on this point has been very clearly laid down by *Cairns,* L. C., "Undoubtedly the lower riparian owner is entitled to the accustomed flow of water for the ordinary purposes for which he can use it; that is quite consistent with the right of upper owners also to use the water for all ordinary purposes, *viz.,* as has been said, *ad lavandam et ad potandam,* whatever portion of the water may be thereby exhausted and cease to come down by means of that use. But further, there are uses, no doubt, to which the water may be put by the upper owner, *e.g.,* uses connected with the tenement of the upper owner, under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation..........Again, it may well be that there may be a use of the water by the upper owner, for, say, manufacturing purposes, so reasonable that no just complaint can be made on the subject by the lower owner. .... Whether it was a reasonable one would depend, at all events, in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water"—*Swindon Water Co.* v. *Wilts and Besks Canal?* It is, however, necessary that this extraordinary use, as stated above, should be for the use of the riparian tenement. If it be not so, an action would lie at once whether actual damage is proved or not. Further, the

use should be a reasonable one. What this is will depend upon the circumstances of each case, and no hard and fast rule can be laid down.

When water is taken for purposes of irrigation, the proprietor has the right to take so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below and without impairing its quality. What quantity of water can be abstracted and consumed without infringing the essential condition must, however, in all cases be a question of circumstances depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume. Suppose, however, that A_1, A_2, A_3,......................A_n are successive riparian owners on the banks of a natural stream, and that each exercises his right to the extraordinary use of the water. It may be that the exercise of the right of each is in itself reasonable; but it may, nevertheless, so happen that A_n is injured by the joint action of all the higher riparian owners. Can A_n then sue all or any of them? The decisions on the subject do not help us here. It is, however, suggested that the person whose act is the immediate and proximate cause of the injury will be held responsible, *i.e., the last in point of time.*

It has been held that an Inamdar has got the right to irrigate his lands adjacent to the stream, even for the purpose of converting his dry lands into wet, if he does not thereby materially affect the rights of other riparian owners. *Narasimha Sastrial* v. *The Secy. of State for India,* I. M. L. J., 167. In that case it was further held that the Government had no power to control such right.

Agriculture being the main industry in India, it may perhaps be better to hold that the use of water for irrigation is but an ordinary use.' (*Vide* the arguments of Mr. Justice *Subrahmania Iyer,* then counsel, in the case last quoted.) Such use must, however, be reasonable; for instance, a riparian owner, who has only a small frontage, cannot be allowed to irrigate all his fields, however, extensive they may be.

The rights of riparian owners existing *ex jure naturæ,* are not limited by the present mode of enjoyment, and a new mode of

enjoying gives a right at once to sue for an injury done in respect of such new use. It also appears that when a riparian owner diverts for the purpose of his tenement the waters of a natural stream by artificial means, he has the same rights in the new artificial channel cut through his riparian lands as he had on the original stream. (*Vide* Pollock, C. B., and Channel, B., in *Nuttel* v. *Bramwell*, L. R., 2 Ex. 1.)

11. Next as to *pollution of streams*: A riparian proprietor on a natural stream has also the right to receive the water in an unpolluted state; and a pollution gives a cause of action without showing actual injury, and the fact that the stream is also fouled by other persons is no defence.

It is essential here to notice that the law makes no difference between natural and artificial channels with respect to the right to the purity of water; nor is the fact that the water finds its way by spreading over the ground or by percolation material. The principle appears to be that the law will not force a man to do a thing for another's benefit, but at the same time it will not countenance the act of a person which injures another. If water is prevented from flowing to land, nothing is done on the land to its detriment; but if dirty water is sent on to the land, a nuisance is created thereon, which is clearly a ground for complaint and can be justified only by acquiring a prescriptive or other right thereto. (*Vide Hodgekinson* v. *Ennor*, 32 L. J. Q. B., 231, and *Ballard* v. *Tomlinson*, 54 L. J., Ch. 454.)

Though it is not necessary that actual damage should be proved for enabling a person to bring an action for pollution, yet actual pollution of some character or other must be proved. The mere throwing of innocuous matter into the stream is not of itself actionable. What is '*pollution*' can be determined as in the other cases only on a consideration of each case. "The size and character of the stream, the use to which it can be or is applied, the nature and importance of the right claimed and exercised by one party, as well as the inconvenience or injury to the other party would be subjects involved in the enquiry." It has been held that discharging heated water into a stream injuriously is a pollution, *i.e.*, the owner has the right to receive the water at the same temperature. (*Cf.* S. 7 of the Easements Act, Il. h.)

11*a*. For other riparian rights, the reader is referred to Tagore Law Lectures, 1889, p. 261 *et seq.*

12. We next come to *artificial* water-courses: When the water does not rise to the surface in a natural way, or when the water is conducted by artificial means, the stream is said to be an artificial one. It was once considered that no rights can be acquired in the nature of easements under any circumstances. But the law as now settled recognises such rights under certain conditions. Thus in *Wood* v. *Waud* (3 Ex. 777), it was said: "The right to artificial water-courses against the party creating them, surely must depend upon the character, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created." In Gale on Easements we find: "Supposing it to be unknown by which party the flow of water was caused and that the flow is beneficial to the owners of both tenements—to the one by the discharge, to the other, by the use to which he puts the water on receiving it—it would probably be presumed that a reciprocal easement did exist." In India it is now beyond doubt that such a right can exist in artificial streams. The Privy Council laid down in distinct terms in *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 6 I. A., 33, that a right by way of easement can be claimed in the surplus water of a tank. In *Maharani Rajroop Koer* v. *Syed Abul Hossein*, 7 I. A., 240, it was further decided that such a right may exist apart from prescription. It appears clear from these and other authorities on the subject that from immemorial user it may be inferred that such a right had its origin in a grant: but it is essential to raise such a presumption that it should be proved that the arrangement was intended to be a permanent one. However long may be the user, no right can be acquired, either by way of prescription, or under the presumption of a grant, in water pumped out of a mine, as it was clearly intended only for the benefit of the dominant owner. But if a channel was constructed as part of a permanent system of irrigation, it would be of such a permanent character as to raise the presumption that it was intended for the benefit of both the parties. Long user, in such cases, will give to the servient owner a right to the flow of water. It may be mentioned that it is unnecessary for raising the presumption of a grant, that user for a fixed or minimum number of years, say, for example, the period required to acquire a prescriptive right, should be proved. User

for a shorter period coupled with circumstances from which a grant can be inferred, would be quite sufficient. As against Government long user may justify a presumption of an original *animus dedicandi*. In *The First Assistant Collector of Nasik* v. *Shanji Dasrath Patil*, I. L. R., 7 B., 209, already quoted, the facts were :- A dam had been in existence across a river for upwards of 280 years, and during all that time the villages of D. and P. had received an equal supply of water from separate sluices in the dam. The Government authorities being of opinion that village D. required less water than P. reduced the size of the D. sluice. The village D. was a ryotwari one, and the ryots of D. appealed against the action of Government. It was held by the High Court that, though Government might have in this country the power to regulate the enjoyment and benefit of the water in the interests of the public, the user found proved was sufficient to justify a presumption of an original *animus dedicandi*.

If the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned it permanently, such stream may become subject to the laws relating to natural streams. Riparian rights may be granted to non-riparian owners; but their rights will be limited to the extent of the right of the riparian proprietor from whom title is derived.

13. Then as to *water percolating* and *surface water*: It is an established proposition of law * that there can be no right to mere surface water or to water that finds its way by percolation: as already stated in order to acquire a right, the water should have a defined course. If A. digs a well in his land and thereby takes away water in the well on B.'s land, B. has no cause of action if A. does not interfere with any defined channels. It does not in the least matter that A. uses the well for purposes unconnected with the tenement, *e.g.*, for supplying the whole town with water nor is it of any consequence that the use interfered with has been uninterrupted and of long duration. It is, however, also established law that if in drawing off water that finds its way by percolation to an adjoining land, the person also draws off water flowing in a defined surface (*semble* also underground) channel,

* It is possible that under the Easements Act a right may be acquired to surface water under an express grant—*vide* S. 7, Ex. (8.)

then he will be liable to action. The distinction, which is a fine one, may be made clearer. If a person intercepts water not running in a defined course *before* it reaches a defined surface channel, then he is not liable to action; but if in so doing he also interferes with water that had *already* found its way into the channel, then he will be restrained from exercising that right. The right becomes dead in fact, though not in law. It has, however, been decided (*a*) that if the owner of land collects water percolating from a natural stream running into the land, he acquires a right to such water and he may sell such right; and if such water is made to run in a stream, such stream will be considered a continuation of the original stream. In *Ennor* v. *Bramwell* (1 D. G. F. J. 529), the Vice-Chancellor was of opinion that the question, whether the principle established by *Chasemore* v. *Richards*, is applicable to a particular case, is affected by the distance through which the water would have to percolate before reaching the plaintiff's land; but this opinion is not borne out by existing authorities.

14. We next come to *easements*. The Easements Act has defined the law so far as this Presidency is concerned, and it is unnecessary to go into the subject in any detail. The more important points will, however, be noticed.

Easements are, as already stated, restrictions of natural rights. They are either permanent or temporary. Permanent ones may be acquired by grant, express, implied or presumed, prescription, custom or statute; temporary ones cannot be acquired by prescription, by grant presumed or (*sic*) by custom; for such a right is inconsistent with the presumption raised in these cases. As instance of a grant implied may be mentioned easements acquired on severance of tenements. There is a difference between the Indian and the English Law in this respect. The English Law will not presume the reservation of apparent continual easements by the transferor—a grantor can never derogate from his grant except by express terms; but here, under the Act, such reservation is implied (*vide* S. 13). As an instance of customary easements may be cited the case in *Orr & others* v. *Ramen Chetti and others*, 18 M. 320. They are generally usages attached to a locality. It seems clear that persons owning land not abutting on a stream may also acquire

(*a*) *Holker* v. *Poritt and others* (8 Ex. 107).

easements in respect of that stream. For the acquisition of a prescriptive right the enjoyment should have been 'as of right,' *i.e., adverse.*

The Transfer of Property Act requires a registered instrument for the transfer of easements; and very probably a similar instrument will be required for their creation; though the law is silent.

The different modes of extinction are enumerated in Chapter V of the Easements Act. Under certain circumstances an easement may be revived (*vide* S. 51).

15. We propose now to state what we think the rights of Government are in this country in non-tidal streams. It is a question of some importance, and is well worth further investigation.

16. To understand the rights of Government in flowing water, it is necessary to have a clear conception of its rights in the soil. Lands are in this country, either permanently settled or ryotwari. To the former class belong zamindaries, polliams (*sic,*) inams, &c. The assessment in these cases has been permanently fixed once for all and is not subject to revision on any account what-so-ever. In ryotwari lands, however, the assessment is revised periodically with reference to the increase in the profits due to causes other than improvements effected by the tenants, chiefly with reference to the increase in prices. It has been admitted on all hands that the soil in the latter class of lands, *viz.,* ryotwari, belongs to the State, the ryots having only the right of occupancy so long as they make no default in paying assessment. Even in the case of permanently settled estates, Mr. S. Sreenivasa Raghavaiyangar in his Memorandum on the Progress of the Madras Presidency has tried to prove that the Zamindars, Polligars or other proprietors were given only the *melwaram* right of Government, and that it was never intended to give them the proprietary right in the soil. We consider that the learned author merely advanced an argument to *justify* his proposed piece of legislation for the amelioration of the condition of the ryots, and did not intend seriously to press that the Regulations XXV of 1802 (Section 2) and IV of 1822 do bear the construction that he wished to put upon them. In any case, it is doubtful if the Courts in this country will look at the Regulations in the same light as he has done. We shall

therefore adopt the more acceptable view, *viz.*, that the Zamindars, &c., have full proprietary ownership in the soil.

17. The proprietors of permanently settled estates being thus owners of the soil, it follows the English law would apply *in toto* to such estates. The banks belong to the owners, and the bed also, unless the view that in all navigable rivers the bed belongs to the State is accepted. As regards water, the proprietors or their tenants have full riparian rights. The Courts have in several cases recognized the right of Government to regulate the supply of water in the interests of the public, but such right has not been well defined. It may be taken for granted that the Government cannot interfere in exercise of their power with the riparian rights of the proprietors or their tenants. (*Narasimha Sastrial* v. *The Secretary of State for India*, M. L. J., Vol. I, p. 167.) In the case of ryotwari lands, the bed belongs to the State, and it appears that the Government has reserved its right in the banks. The ryots of adjoining lands have, however, the right of access to the stream and full riparian rights to the water. In this case also, it is not clear how far the right of Government to regulate the supply according to public requirements abridges such rights. The Easements Act, Section 2 (*a*), no doubt recognizes the existence of such a right in Government. In the case of works constructed at the public expense the Government may have very large powers, as such works are in the nature of artificial water-courses; but the mere constructions of a dam or sluice or an anicut cannot bring a natural stream under this class. In *Ponnusami Tevar* v. *The Collector of Madura* (5 M. H. C. R., p. 29), Justice *Innes* qualifies the right of Government to collect, retain and distribute the water of natural rivers thus;—"The Government of this country has at all times assumed to itself and has the right in the interests of the public to regulate the distribution for use of any portion of the water flowing *in the natural channels in which rights have not as yet been acquired.*" This is perhaps the more correct view, and the existing rights of the ryots cannot therefore be interfered with.

18. There is one other question which calls for notice, *viz.*, the liability of Government in case of floods. According to the English law, a riparian owner on inland waters has an ordinary right *primâ facie* to protect his land from the inroads of flood water, *provided* he can do so without injury to others. (*R.* v. *Trafford*,

8 Bing. 204.) In the case of extraordinary floods, he can protect himself without regard to the consequences in respect of others. (*Nield* v. *L. N. W. Ry. Co.*, L. R., 10., Ex. 4.) In Zamindaris, &c., the proprietors have perhaps the same rights(?)* The Government, however, stand in a different position in respect of ryotwari lands. It has undertaken to maintain the banks for the benefit of the riparian owners on either side of the river. What then is its liability—1st, in respect of natural streams, and, 2ndly, in the case of works constructed at the public expense ? In the first case, the stream being a natural one, there cannot be *absolute* liability; but we are of opinion that for negligence proved, the Government will be liable. Even as regards the latter class of works, as they are constructed for public utility, the Government will perhaps be exonerated from *absolute* liablility.

T. RAJARAM ROW.

TRANSLATED FROM THE VIVADARATNAKARA.

On Payment of Debts.

On this subject, Brihaspati says: "By whom, at what place and in what manner, should and should not, be paid a debt taken from another's hands according to the law of kusida (interest), is now declared. A debt contracted without any stipulation as to time should be paid on demand; or (where any time is fixed) when the (stipulated) time has expired or when the interest has ceased to accrue. In default of the father, the debts should be discharged by the sons."(1) Prakála:—time fixed (for payment). If a debt had been contracted without any stipulation as to the time (of repayment) then it should be paid as soon as demanded; but if there be any stipulated time, the debt borrowed should be paid when the time expires. The construction is 'in default of the father, it should be paid by the sons.'

Accordingly: "The debt of the father should be paid first; and then one's own debt; before both of these should the debt of the paternal grandfather be paid; thus should debts always be discharged."(2) A man should discharge the three debts, *i.e.*, that

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* Even here, in the case of public works, the Government will be liable for negligence proved.

(1) Brihaspati, XI, 46 and 47. (2) Ibid, XI, 48.

of the grandfather, etc. The meaning is that he shall discharge first, the paternal grandfather's debts; then his father's; and then, his own.

Narada says: "When the father is dead, the sons divided, or undivided shall pay the debt according to their shares; or the manager of these."(1)

Yajnavalkya: "When the father has gone to a foreign country, is dead or immersed in grief, the debts should be paid by sons and grandsons, after they have been proved by witnesses in case of doubt."(2) The meaning is that where the father is unable, his debts should be paid by his sons, and in default of them by his grandsons. 'In case of doubt,' *i.e.*, if it is concealed by the debtor. 'Proved by witnesses' established by evidence that the sum is due.

Katyayana: "A debt of the paternal grandfather proved or the balance unpaid (of a debt) should be paid [by the grandsons when proved; but never shall a debt (of the grandfather) incurred for immoral purposes or questioned by the father be paid."(3) Proved, established by evidence. For immoral purposes] for spending in gambling or spirituous liquors, etc., gambling, spirituous liquors, etc., will be described presently. Questioned:—contested by the father that 'this shall not be paid.'

Accordingly: "Bhrigu has ordained that a debt, descending from the grandfather in succession and proved by the father should be paid by the grandsons if it had not been incurred for immoral purposes and not (already) been paid by the sons. That debt of the grandfather which had not been paid by sons who are diceased, etc., should similarly be paid by the grandsons without interest."(4) [Proved:—established by evidence. Not incurred for immoral purposes] not for spending in gambling or spirituous liquors.

Katyayana: "But if a creditor claim a large sum of money, only so much as the creditor may prove by witnesses (to be due to him) shall he recover as a debt."(5) The meaning is that if a creditor claim a large sum of money, only so much as the creditor

(1) Narada, I, 2.
(2) Yajnavalkya, II, 50.
(3) I, Cole, Dig., 207, CXCVI.
(4) Ibid, 207, CXCVII.
(5) Ibid, 208, CC.

proves shall the debtor raising a false defence be made to pay; but he shall not be made to pay even the unproved portion. "By witnesses" denotes only evidence in general.

Accordingly: "The debts contracted by the fourth in ascent, should be discharged, in the absence of patrimony, by the grandsons even with difficulty; after them, that (right of discharging the debts) ceases."(1) The (duty of discharging) debts contracted by the fourth in ascent ceases with the great grandson. The purport is that the great grandson shall not pay the debts of the paternal great grandfather.

Narada: "Whatever debts of the grandfather remain undischarged by his sons should be discharged by his grandsons; that ceases with the fourth (in descent)."(2) Regularly] duly from the father and the paternal grandfather. With the fourth] with the great grandson.

Brihaspati says: "The debts of the father when proved should be liquidated by the sons, like their own debts; the principal only of the grandfather's debts should be discharged by the grandsons; but it is not payable by his son, (*i.e.*, great grandson)."(3) The meaning is: the father's debt when proved, shall be paid by the sons, as their own debt, *i.e.*, with interest; and by the grandsons without interest. It need not be discharged at all by the great grandsons.

Yajnavalkya: "Debts secured by documents should be paid by three persons only; but a pledge shall be enjoyed as long as it is not paid."(4)

As for the undischargability stated of the debts from the great grandsons downwards that should be understood to apply where the debt is incurred by the great grandfather, etc., without pledging land, etc., to be enjoyed. The meaning is that debt contracted after pledging anything should be paid even by the fourth in descent downwards of the same family.

Vishnu: "Where the debtor is dead, or has entered the order of a Sanyasin, or has remained for twenty years in a foreign

(1) I, Cole. Dig., 208, CXCVIII.
(2) Narada I, 4.
(3) Brihaspati, XI, 49.
(4) Yajnavalkya, II, 90.

country, the sum lent should be paid by his sons and grandsons; beyond that (it need not be paid by descendant) if unwilling."(1) The term 'twenty years' goes with 'remaining in a foreign country.' 'Beyond that,' *i.e.*, after the third in descent; that is, it need not be paid by the fourth in descent, etc. By the term 'if unwilling' is indicated that if there be a wish to benefit their great grandfather and the rest, then the debts even of these may be discharged by the great grandsons, etc.

Narada: "If a person goes to a foreign land, his son, paternal uncle or eldest brother shall not pay his debts before twenty years have elapsed."(2)

Kátyáyana: "During the lifetime of a diseased person, or of one who has gone to a foreign land, his sons shall not pay his debts before twenty years have elapsed."(3) This should be understood to apply only where there may be hope of the diseased person recovering and of the person who had gone abroad returning. Where, however, the diseased person is suffering from incurable diseases, and where, the person who had gone abroad is not expected to arrive, in that case, even during the lifetime of the aged father, his son deserves to pay the debt at once; the lapse of twenty years need not be waited for.

The same author states that: "Even during the lifetime of diseased, mad, or aged fathers, and of those likewise who have remained long abroad, their sons should be made to pay their debts."(4)

Brihaspati also states that, even where the father who is suffering from incurable diseases such as consumption, etc., is near, his debt should be discharged by the sons only: "Even when the father who is blind from birth, degraded, mad, or suffering from consumption, dropsy, etc., is alive, his debt should be paid by his sons when proved."(5) Jétyandha] blind from birth. The term 'of those suffering from consumption, dropsy, etc.,' is illustrative of incurable diseases. The statement in the Parijata that the purport is if the father is altogether incompetent to discharge debts, then the debts should be discharged by the son, is only fair. Really, if

(1) Vishnu, VI, 27.
(2) Narada, I, 14.
(3) Not found.
(4) II, Cole. Dig., 193, CLXXVII.
(5) I, Cole. Dig., 193, CLXXVIII.

the father is so (diseased) as to be incompetent to share, and the son possesses no separate wealth, then the debt should be paid by the son only; but where the father possesses exclusive property of his own, then, even though he is so (suffering from incurable diseases), the debt should be paid by him alone. Where, however, the father is altogether unfit to discharge the debts, and the son competent, then it should be paid by the son alone.

Accordingly: "When the father goes to a foreign country, the debt which had been jointly borrowed by him, the son shall pay entire; and when the father is dead, (he shall pay) his father's share of the debt alone and never that of others."(1) What debts had been borrowed conjointly with another by the father then, in the absence of the other and when the father has gone abroad, the son shall give his father's share and that of the other; but when the father is dead, he shall pay his father's share only. This is the meaning.

Narada: "The debts borrowed conjointly should, even where one is present, be discharged; when they are dead, their sons need not pay the other's debts."(2) The meaning is this: The debt contracted conjointly should be discharged entire even when one only of them is alive. But where all the joint debtors die, their sons should discharge it according to their shares, and one only of them need not pay the whole.

Kátyayana: "Of those who have jointly contracted debt, if one of them alone is alive, his son shall give the whole debt if the father is gone abroad and his father's share only if the father be dead."(3) The meaning is that if among all those joint debtors, one alone is alive, then he by himself should be made to pay the whole; or if the father has gone abroad and if his son is alive, he also should be made to discharge the whole; but if the father be dead and the son be alive, he shall be forced to pay his father's share only and not the whole.

Vishnu: "The debt contracted conjointly, by unseparated brothers, he of them who is present, should pay; so also the paternal debt should be discharged by him who is present. If they be

(1) I, Cole. Dig., 199, CLXXXIV.
(2) Narada, I, 15.
(3) I, Cole. Dig., 199, CLXXXIV.

divided, they should pay the debt according to their shares."(1) Whatever debt is jointly borrowed by undivided co-parceners, he of them who is alive, though one, shall pay; he, though one, of the undivided brothers who is alive, shall pay the entire debt of the father; but separated brothers shall pay according to their several shares. This is the meaning.

Yajnavalkya: "What debt is contracted by unseparated co-parceners for the family, the heirs shall pay if the head of the family be dead or gone abroad."(2) The meaning is that what debt is borrowed for the family by even one of the undivided parceners, the other undivided parceners shall pay when the borrower is dead or has gone abroad.

Narada: "Whatever debt is contracted for the family by the undivided paternal uncle, brother, or even mother, that all the co-heirs shall pay."(3)

Manu: "If the debtor be dead and (the sum borrowed) was expended for the family, it must be paid by the relatives out of their own (property), even though they be divided."(4) "Dead" is illustrative. Out of their own] own property. The meaning of this is that if one of the co-heirs who possess wealth distinct from each other borrows money for the necessary support of all the co-heirs and becomes incapable of paying the debt owing to death, etc., then that debt is payable by all the co-heirs.

Brihaspati: "The head of the family must pay any debt incurred for the family by the paternal uncle, brother, son, wife, slave, pupil and dependents."(5) The purport here is that debts incurred for the family by others even, should be discharged by the head of the family.

Narada: "Though independent, one is not liable to pay the debt if he had not attained age."(6)

Kátyayana: "When the father is dead, his debts are not payable by (his sons) who have not attained age; but when they have come of age, it should be discharged according to law;

(1) Vishnu, VI, 34 and 35.
(2) Yajnavalkya II, 45.
(3) Narada, I, 3.
(4) Found in Narada, I, 13.
(5) Brihaspati, XI, 50.
(6) I, Cole Dig., 261, Cl. XXXVIII.

otherwise, they will live in hell."(1) The meaning is that even though the father is dead, the debts are not to be paid by the sons not of age; but should be paid by them when they attain age. "According to law," *i.e.*, according to shares, or as the case may be.

Narada: "Ancestors wish for sons for their own benefit, because they think 'this son will absolve me from debts to the high and the low.' Therefore, the father should be absolved from debt by the son born at any effort reckless of his own benefit, so that the father may not go to hell. If one dies debtor, whether a devotee or agnihotri, (the benefit of) all the devotion and agnihotra accrues to the creditor."(2) Debts to the high and the low] debts to the high, *i.e.*, debts due to the gods, the sages and the manes and 'debts to the low,' *i.e.*, debts due to men. But Halayudha, considering that the text occurs in the context regarding debts due to men, interprets the expression to mean "low debts due to creditors. Debts are low because debts not paid are a source of great evil. The rest is easy to understand."

Brihaspati says: "He who, having received a debt, etc., does not give it to the owner will be born in his house as his servant, son, wife or cow."(3) The word 'ujjama' means 'debt.' By the word 'adi' is denoted deposit, etc.

Manu says: "Whatever acts are done, even by a servant for the benefit of the family either in the same or different country, the master shall not question."(4) Adhyadinah] servant, etc. Jyáyán] here master.

Narada says: "Whatever is borrowed on account of the family by a disciple, attache, servant, or woman, business agent should be paid by the master of the family."(5) Vaiyáprityakarah] business agent. Uchchannam] debt borrowed.

Vishnu says: "What has been agreed to be paid or borrowed on account of the family should be paid."(6) The word 'debt' should be supplied. Any debt contracted by another though not on account of the family if he had undertaken to pay it should be paid. Debt borrowed on account of the family should certainly be paid.

(1) I, Cole. Dig., 201 Cl. XXXVIII.
(2) Narada, I, 5 and 9.
(3) Not found.
(4) Not found.
(5) Narada, I, 12.
(6) Vishnu, VI, 38 and 39.

Kátyayana says: "What is borrowed by an incapable or diseased man on account of the family, or during distress should be known as debt borrowed in distress, as also debt borrowed for the marriage of a maiden, or for funeral rites; all these should be given by the master of the family."(1) The genitive case in 'master' denotes the doer. Therefore, it means that it should be discharged by the head of the family.

Accordingly: "Bhrigu has ordained that even if a debt has been incurred for the family of a person who had gone abroad by a servant, wife, mother, pupil or son, without his consent, he should pay it."(2) The purport is that it is the opinion of Bhrigu that the debt contracted by the son or the servant, etc., for the support of the family of a person who had gone abroad even without his consent, the person so gone abroad shall pay.

Narada: "The father shall pay any debt incurred by the son with his consent or (without it) for the maintenance of the family, or while in distress."(3) Krichchre] while in distress.

Brihaspati: "Debts contracted by the son should be paid by the father, if he had consented to it; or he may pay it out of affection for his son; otherwise he need not pay."(4)

Kàtyayana: "According to law, the debts contracted by the son need not be paid by the father; but he must discharge it if he had promised or subsequently agreed to it."(5) "Promised" here means 'consented at the time of taking the loan'; and 'subsequently agreed' means 'promised after taking the loan. The using of the word 'son' is illustrative.

Manu: "The son shall not pay debt contracted by the father as surety, useless gifts, spending in gambling, or drinking and what remains unpaid of a fine or toll. The rule stated applies to the case of a surety for appearance."(6) By 'surety' are here indicated the surety for appearance and for confidence. Useless gifts] gifts which produce no benefit. Akshikam] for gambling. Saurikam] for spirituous liquors. Here is described (the debt) which originates

(1) I, Cole. Dig., 205, CXCIII.
(2) Not found.
(3) Narada, I, 11.
(4) Not found.
(5) Not found.
(6) Not found.

in gambling and spirituous liquors. By 'surety for appearance' is to be understood the surety for confidence also.

Brihaspati: "Sons shall not be compelled to discharge debts contracted by their father for spirituous liquors, for gambling, for promises made under the influence of love or wrath, for suretyship, or what remains unpaid of a fine or toll."(1) Promises made out of love or when angry, shall be described presently.

Gautama: "Money due by a surety, commercial debts, sulka, debt incurred for liquor, and for gambling, and fines shall not affect the sons."(2) The meaning is that money due by a surety, debts for commerce, etc., are not to be discharged by the sons.

Vyasa: "Neither a fine nor what remains unpaid of a fine, neither a toll nor what remains unpaid of a toll, shall be paid by the sons, nor an immoral debt."(3) Here, because by the expression 'a fine,' is denoted also the balance due of a fine and it is nevertheless repeated, the meaning should be that if the fine is very great, it should be paid; if the balance due be small, it need never be given; and that if the fine is small, the whole need not be given.

(A text states): "What has been promised (by a person) with or without a document, to a woman who belonged to another before, one should know that to be a debt incurred out of love. But let one consider that a debt incurred under the influence of anger, which one has promised to gratify another whom he has injured or whose property he had destroyed."(4) Ukta] promised. Likhitva] secured in writing. Muktakam] without document. A debt incurred under the influence of love is the debt which one incurs being short of funds to pay what has been promised to a woman who belonged to another before. The expression 'woman who belonged to another before' refers only to a woman who is not married. The debt which one borrows to give to and please another whose wealth he had destroyed out of anger or whom he had injured is called debt made by wrath. It is these alone that have been previously referred to as debts made by love and wrath.

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(1) Brihaspati, IX, 51.
(2) Goutama, XII, 41.
(3) I. Cole. Dig., 211, CCIII.
(4) Ibid 212, CCIV.

Yajnavalkya: "A woman shall not pay a debt contracted by her husband or son, a father that incurred by a son, and likewise a husband, that by a wife, unless it be incurred for the family." (1)

Vishnu: "Neither the husband nor the son (shall pay) debts borrowed by a woman." (2)

Katyayana: "The debt contracted by the wife is payable by the husband, that contracted by the mother is payable by the son, if borrowed for the support, when he has left word and gone abroad." (3) The meaning is that where the husband or the son does not provide for the maintenance of the wife or the mother, or goes abroad, then the debt incurred by the wife or the mother for her maintenance and clothing should be paid by the husband or the son. 'Having left word,' that being generally done so; for the reason equally applies even where no word is left.

"The debt incurred by the wife, if it is not in distress, is not payable by the husband; for the necessities of the family are indispensable." (4) The meaning is that debts of the wife, excepting that incurred for the family while in distress, are not payable by the husband.

Yajnavalkya: "The debts incurred by the wives of a herdsman, a vintner, a dancer, a washerman, and a hunter, their husbands shall pay; for their livelihood is dependent upon them." (5) Sailúsha] dancer.

Brihaspati: "The debts contracted by the wife of a vintner, or hunter, or washerman, or herdsman, or a barber, the husband shall pay; (for) it was incurred in the concerns of the husband." (6) The purport is that their husband shall be made to pay their debt, for the debt was incurred by them in the concerns of the husband. Here regard should be had to the living in dependence on their labour and not to the class to which they belong.

Yajnavalkya: "What is agreed to by the husband, (what is) borrowed jointly with her husband or by herself, all this is payable (by her); a woman shall not pay any other debt." (7)

(1) Yajnavalkya, II, 46.
(2) Vishnu, VI, 32.
(3) I. Cole. Dig., 219, CCXIX.
(4) Narada, I, 18.
(5) Yajnavalkya, II, 18.
(6) Brihaspati, XI, 53.
(7) Yajnavalkya, II, 49

Katyayana: "A debt contracted by a woman jointly with her husband or her son or by the woman herself alone, shall be paid (by her); in such and in no other case is debt contracted by them payable by her."(1) Contracted by them] incurred by the husband and the son.

Accordingly: "If a woman be asked by her husband at his death-bed, 'pay this debt,' she must pay it, however unwilling, if wealth is left with her."(2) The meaning is that if a woman is ordered by her husband, whose death is near or who is shortly to go abroad, that some debt is payable by her, she should, on his death or when he had gone abroad, be compelled by the king to pay such debt, even though she be unwilling. 'Who is at his death-bed' is only illustrative.

Narada: "The childless widow shall pay the debts of a person whether ordered by him at his death-bed to do so or not, or he who takes his wealth shall pay his debts."(3) By 'or he,' etc., is meant that whatever other person takes the wealth, he should also pay the debts.

Vishnu: "He who takes the wealth of a man with or without male issue shall pay his debts; but the debts of a moneyless man, the taker of his wife shall discharge."(4) Dhana] debt. But in the word 'adhanasya' (of a moneyless man), *dhana* is used in the sense of wealth.

In this connexion Narada states that kind of women, who taken, the taker becomes liable to pay the debts incurred by her husband: "She who is the last mentioned of 'harlots' and she who is first mentioned of 'twice-married women'; the enjoyer of these is bound to pay the debts of their (former) husbands."(5) This is the meaning. The fourth of the four sorts of harlots and the first mentioned of the three sorts of twice-married women; taking these two alone, one should pay the debt incurred by their (former husband) and (one need not pay) the debt incurred by the husband of other kinds of women.

Narada himself states that threefold (classification of) twice-married women and the fourfold (one of) harlots. It is thus:

(1) I, Cole. Dig., 216, CCXI.
(2) *Ibid*, 216, CCXI.
(3) Narada, I, 17.
(4) Vishnu, VI, 29 and 30.
(5) Narada, I, 24.

"Seven other sorts of wives who had been previously enjoyed by another are laid down. Of these the twice-married woman is of three kinds; and the harlot of four. A maiden not deflowered, but disgraced by the ceremony of marriage, is the first kind of twice-married woman, because of the performance again of the (marriage) sacrament. That woman who having become bold is given away (in marriage) by elders according to the law of the land, is declared to be the second. She who is given, in the absence of brothers-in-law, by her relatives to a person of the same caste or to a sapinda, is the third. That woman, who, whether having children or not, goes to live with another man through love, while her husband is alive, is the first harlot. She who abandons the husband of her youth and betakes herself to another man and afterwards returns to her husband's house, is declared to be the second class of harlots. She who, when her husband is dead, rejects her brothers-in-law and the rest and unites herself with another through lust is the third class. She who has come from a foreign land being bought for money, and afflicted with hunger and thirst and who gives herself to one saying 'thine I am' is the fourth."(1)

Katyayana : "The debt contracted by vintners, etc., who have neither money nor issue, he who enjoys their women shall certainly discharge."(2)

Narada : "He who takes the wife of a man dying without money or issue shall pay his debts; for she is considered his property."(3)

This text of Narada should be understood to apply to the case of vintners, etc., mentioned by Katyayana.

Yajnavalkya : "He who takes the wealth shall be made to pay the debts; so also he who takes the wife; the son shall not be made to (pay the debt) where the wealth had been taken by others; the debts of a childless man, the heirs shall pay."(4) By 'the son, etc.,' is meant that the son though living is not bound to pay the debts, if the (father's) property had been inherited by another. Here, the construction is "he shall not be made to pay the debts." Here the son who is competent to take the wealth of the father is denoted,

(1) Ibid, III, 46—52.
(2) I, Cole. Dig., 223, CCXXII.
(3) Narada, I, 22.
(4) Yajnavalkya, II, 51.

and not the son who has obtained the wealth of the father, because he is implied by the term 'he who takes the wealth.' Kalpataru states that this is to prohibit the liability of the sons of persons, blind, lame, etc., who are incompetent to inherit their father's property, to discharge their father's debts.

Narada: "Of the taker of the wealth, the taker of the widow and the sons, he who takes the wealth shall pay the debts; in the absence of the takers of the widow and of the wealth, the son (shall pay); and in the absence of the person who takes the wealth and of the son, the taker of the widow (shall pay)."(1) The meaning of this is: If there be the person who takes the wealth of the debtor, the person who takes his widow and the son who answers to the description laid down by Katyayana, then the person who takes the wealth and not the others shall be made to pay the debts; so also if there exist the taker of the widow and the son of that description, then the taker of the widow and not the son (shall be made to pay); if, however, the son is possessed of all qualities as being free from disability, etc., laid down by Katyayana, then he alone shall pay the debt.

Katyayana says that: "The son shall be made to pay the debts, if he be free from disability, competent to inherit and able; if otherwise he shall not be made to pay. Where the son is immersed in grief or young, then the taker of the wealth shall be made to pay (the debts); in his default the taker of the widow."(2) Competent to inherit] devoid of (defects such as) being born blind, or deaf, etc. Able] able to bear the debts. The construction is that where there is the taker of the wealth and the son is immersed in grief, etc., then the former should be made to pay.

Brihaspati: "The discharger of the debts is he who takes the wealth, if the son is disabled; so also the taker of the widow, in default of the taker of the wealth."(3) It must be understood that in the absence of both of these, the son though suffering from disability shall discharge the debt, as inculcated by Narada.

Yajnavalkya: "He who takes the wealth shall be made to pay the debt; likewise, he who takes the widow; and not the son

(1) Narada, I, 23.
(2) Not found.
(3) Brihaspati, XI, 52.

where the property is taken by another; the heirs shall pay the debts of the sonless person."(1) Here also, the purport is that if there be a son and the property is not taken by another, he alone shall pay the debts; and if that be not the case, he who takes the wealth and he who takes the widow (shall pay).

Katyayana: "If a woman, in the absence of daughters, and without the consent of her son, and possessing large stridhana property, leaves her son and lives in dependence upon another, her property shall be taken by the son. He shall take it for paying the debt and not for his own enjoyment; for the parents shall not be made to give on improper grounds. Manu says that if a mother abandons her own son though competent, the son shall in that case take her stridhana property and discharge the father's debts."(2) Amatena] without his consent. "Having much wealth," having large stridhana property. In the absence of daughters] if there are no daughters. The meaning of the third verse is this: If a woman who, abandoning a competent son, and taking her stridhana, unites herself with another man without the consent of her son, the son shall take the stridhana and discharge the debt. By the expression "though competent" even an incompetent son is included. It has been shown that in case a woman abandons her son, her stridhana property should be taken by the son.

Narada: "Where a mother leaves her son and lives in dependence on another, the son shall pay having no wealth of her own, all the father's debts."(3) The meaning is that if a woman who has no wealth of her own leaves her son and lives in dependence on another, the son alone shall pay the debts incurred by her husband.

Accordingly: "But if a woman having large stridhana wealth and issue, seeks another man, he must either pay her husband's debts or reject her with her wealth and issue."(4) Sapradhana] having large (stridhana) wealth. Bhartuh] of the man who had married her. The meaning is that if he does not pay the debt he must reject her with her wealth and issue.

Katyayana: "If a woman having an infant son and large estate, betakes herself to another husband, then he to whom she

(1) Yajnavalkya, II, 51.
(2) I, Cole. Dig., 228, CCXXIV.
(3) Narada, I, 20.
(4) Ibid I, 21.

betakes herself shall pay the debt (of her husband); this is declared to be the law respecting women having infant sons. A person who had been long absent in a foreign land, one who has no kindred, an idiot, a mad man and a heretic, even, and the rest though these are alive, their debts should be paid by those who take their wives and their property." (1) The meaning is that in the case of those long absent in a foreign country, etc., (the debts should be paid) by those who take their wives and property.

Here ends the chapter of the Vivadaratnakara on the payment of debts.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Collector of Dinagepur v. Girja Nath Roy, I. L. R., 25 C. 346. The point in this case is one of considerable difficulty. The question was whether the owner of a ferry who was also the owner of the adjoining land which was taken under the Land Acquisition Act for the purposes of a bridge was entitled to claim compensation for the damage to the ferry. Cl. 4 of S. 23 provides that "the Court shall take into consideration the damage sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner or his earnings." Here the learned Judges hold that the word *acquisition* includes the purpose for which the land is acquired. In a somewhat similar case *Hopkins* v. *Great Northern Railway Company,* 2, Q. B., 224, the Court of Appeal refused to award compensation on the ground that it was not the taking of the land or the construction of the bridge that caused the damage but the user; and such user was not specified as liable to be taken into account. Moreover, *Mellish,* L. J., pointed out that no action in tort would lie against a private person in such a case and there was no reason why a company should be made liable. S. 24, Cl. 3, specially points out that the Court should not take into consideration any damage sustained which if caused by a private person would not render such person liable to a suit. This rule would seem to be an enactment on the principle laid stress on by *Lord Justice Mellish.* But looking at clauses 5 and 6 of S. 24, there seems to be ground for the opinion of the learned Judges in the case under notice that the use to which the land may be put in case it depreciates the

(1) I, Cole. Dig., 226, CCXXVII and VIII.

value of other land may be taken into consideration. This is not enacted in terms and unless such depreciation is actionable in the case of a private person, Cl. 3 would preclude the depreciation being taken into consideration. There is force, no doubt, in the argument that the word *acquisition* in Cl. 4 should include the purpose also, for the acquisition by itself does not generally injuriously affect other property. But we think that this is not necessarily the case; for it is well conceivable that the ownership of another person in the land separated may in many cases injuriously affect the land retained. Furthermore, the damage to be taken into consideration in Cl. 4 is the damage sustained at the time of the Collector's taking possession of the land. Supposing the bridge was not constructed for many years, no damage would accrue to the ferry. The decision in *Cowper Essex* v. *Acton Local Board*, L. R., 14 A. C., 153, of the House of Lords does not affect the present case. We are inclined to think that the Court has placed a much more liberal construction upon the language of Clause 4 of S. 23 than it warrants. Sufficient attention, we think, has not been paid to Cl. 3 of S. 24.

Jagannath Prasad Gupta *v.* Runjit Singh, I. L. R., 25 C. 354. We are glad that the somewhat extraordinary decision of *Shephard* and *Davies*, J. J., in *Parvathi Ammal* v. *Saminatha Gurukal*, I. L. R., 20 M. 40, has been dissented from by the Calcutta High Court. The decision of the Madras High Court came upon us by surprise, and we hope, it will not be followed. Some observations of the Privy Council in previous cases have been deemed to warrant the startling proposition that unless a person sues to establish an adoption within six years from the date of it, he loses the chance altogether. The law lays down a period of twelve years for the recovery of immoveable property and there is no suggestion that that period has been cut down, because the person suing to recover it is an adopted son whose adoption is disputed. Until the Privy Council expressly decides this, there is no reason why such an obviously unsound proposition should be accepted as good law.

The case under notice lays down another important rule that the management of an endowment reverts to the heirs of a founder on failure of the heirs of trustees and on default of appointment of a successor as provided in the trust-deed.

Saral Chand Mitter *v.* Mohun Bibi, I. L. R., 25 C. 371. The question dealt with in this case is one of very considerable importance—whether a contract by a minor is void or voidable if another person has

acted upon the representation by the minor that he was of age and has parted with money or done any other act upon the faith of such representation. The mere fact of the minor contracting cannot be taken to amount to a representation that he was of age; or that it was a ground for estoppel, for the other party may not have relied upon it. The broad proposition above enunciated is merely the rule of estoppel contained in S. 115 of the Indian Evidence Act and is accepted by the Bombay High Court in *Ganesh Lala* v. *Bapu*, I. L. R., 21 B. 198, as applicable to a cantract by a minor. In the case of *Dhanmull* v. *Ram Chunder Ghose*, I. L. R., 24 C. 265, three Judges of the Calcutta High Court consider the rule of estoppel inapplicable to the case of a minor and would not give a decree for money against the minor even though upon the faith of a fraudulent representation by the minor the contract was entered into. S. 115, however, does not require fraud on the part of the person making the representation to justify the application of the rule of estoppel; and this has been so expressly ruled by the Privy Council, *Sarad Chunder* v. *Gopal Chunder*, I. L. R., 20 C., 299. In the case under notice, where there was a fraudulent representation by the minor that he was over age and a mortgage deed was executed, a mortgage decree was granted by the Court. The Chief Justice seems also to throw doubt upon the correctness of the ruling in the earlier case that no personal decree could be granted. There is a largen umber of decisions cited justifying the mortgage decree on the ground of fraud; and apparently this would not be questioned by the Judges who decided the earlier Calcutta case in I. L. R., 24 C., 265. But the question remains whether the rule of estoppel will apply when the representation is innocent. And there is also the further question whether a personal decree could be granted assuming the mis-representation to be fraudulent. We are unable to see why a personal decree should not be granted if a mortgage decree could. The decision in *Nelson* v. *Stocker*, 4 De. Gex. & J. 458, would seem to justify Chief Justice *Maclean* in his doubts as to the correctness of the case in 24 Calcutta. Probably, the sound rule will be to do away with a number of refinements and to hold that the rule of estoppel in S. 115 applies to the case of minors, unless there be any over-riding principle. But should the rule of estoppel be applied in matters of status which are public law, Can a person become a husband or wife by estoppel? If not, how can one be a major by estoppel? It has been held that one may be an adopted son by estoppel. But the question has nowhere been discussed on this broad ground.

Dost Muhammad Khan *v.* **Syed Begam**, I. L. R., 20 A., 81. Explanation 2 to section 13, C. P. C., lays down an important principle. If a ground of defence has not been alleged in a previous suit, it is not open to the party who should have alleged it to rely upon it in a fresh suit, all the other conditions as to parties and cause of action being the same. This principle is applicable to a suit for

partition by some of the heirs of a deceased Mahomedan, and the defendants having failed to claim a reduction for a dower-debt, are precluded from claiming it in a new suit by them. And this rule of *res-judicata* is applicable as between co-defendants also; for in a partition suit where the share of each has been ascertained, the contention which each is entitled to set up should be deemed to have been set up. The more difficult words in that explanation are "ground of attack." In an early Madras case, they received an interpretation to mean ground of attack to the defendant's pleas and not causes of action against the defendant. But the recent decision of the Privy Council in *Kameswar Parshad* v. *Rajkumari Ruttun Koer*, 19 I. A., 234, has over-ruled this limitation. The exact scope of this Privy Council ruling has not yet been settled. Though the Madras High Court has followed it to its full consequences, two Division Benches of the Madras High Court have practically differed as to its scope: see *Subrahmania Chetti* v. *Authinarayanan*, 7 M. L. J. Rep., 288; *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M., 91.

Sheorania v. Bharat Singh, I. L. R., 20 A., 90. There is considerable force in the arguments of the learned Judges in this case, but none of the circumstances referred to is sufficient to preclude an amendment of the plaint; and whether he is a minor or a major the plaintiff is the same. Verification may be made by a person acquainted with the facts and as regards the signature to the vakalat and the plaint, the defect is not such as could not be cured by the amendment. We are disposed to agree with the more lenient view taken by the Calcutta High Court in *Taqui Jan* v. *Obaid-ulla*, I. L. R., 21 C. 866.

Aman Singh v. Narain Singh, I. L. R., 20 A. 98. We doubt the correctness of this decision. Chief Justice *Edge* and *Banerji*, J., are of opinion that if a compromise decree is passed without previous leave to enter into a compromise having been given to the guardian of a minor party to the suit, such minor cannot sue to set aside the decree, assuming the compromise to have been beneficial, on the mere ground of want of sanction. They cite no authority in support of this view and the language of the section that the compromise shall be voidable against all parties other than the minor is obviously against that view. This provision is not limited to proceedings by way of review or appeal and a separate suit to set aside the decree on the ground of want of sanction lies. It was so held in a recent case in Madras, *Arunachalam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M. 91; and a number of earlier cases to the same effect are collected in Mr. O. Kineally's notes to S. 462.

Sri Gopal v. Prithi Singh, I. L. R., 20 A. 110. The holder of certain prior mortgages, sued as a defendant, failed to plead some of

them in answer to the plaintiff's suit. In a subsequent suit by him for sale, the Court held that he was disentitled to rely upon those mortgages not pleaded under explanation ii to S. 13. It is a matter which he ought to have made a ground of defence. There would be nothing to preclude his asking for a personal decree, for his right to a personal decree would have been no ground of defence in the prior suit. As the prior mortgagee was entitled to a suit upon the sale being made subject to his mortgage or if the property was sold free of all mortgages that the prior mortgagees should be paid first out of the sale proceeds, the existence of the prior mortgages was a legitimate ground of defence, the failure to plead which was rightly held to disentitle prior mortgagee from suing for sale.

Fazal Husen v. Raj Bahadur, I. L. R., 20 A., 124. When an order of abatement of an appeal is passed by an appellate court, the appellant having died, the date from which limitation runs for execution is held to be the date of the original decree and not the date of the order of abatement. Cl. 2 of the 3rd column of Art. 179. specifies the date of the final decree or order of the appellate court as the starting point for the execution of a decree or order. It may be the words '*decree*' and '*order*' in the 3rd column may refer respectively to the words '*decree*' and '*order*' in the 1st column. But we think the more correct view is to hold that the final order of the appellate court is the starting point for the execution of a decree also. It has been so held in the cases of orders of withdrawal of the appeal: *Wazir Mahton* v. *Lulit Sing*, I. L. R., 9 C., 100; *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati*, I. L. R., 16 C., 250. The Madras High Court has also taken the same view. The question has been raised whether there is an appeal at all when none lies by law or the memorandum of appeal is insufficiently stamped. Having regard to the language of the Court Fees Act that the memorandum of appeal shall have no validity whatever in case of insufficient stamp, the more technical view may be that there is no appeal in such a case and hence the date of the original decree is the starting point. But a more liberal view has prevailed in Calcutta and even where strictly no appeal lies, it has been held that the date of the appellate decree or order is the starting point. The order of abatement is the final order of the appellate court, and prior to that there was an appeal properly pending. There seems to be no reason why that should not be taken as the starting point for an application for execution.

Sadiq Husain v. Lalta Prasad, I. L. R., 20 A, 139. This appears to us to be rather a hard case and we doubt whether the conclusion to which the court came was inevitable. A decree of the High Court was

assigned and the assignee executed and realised what was due to him. The judgment-debtor appealed to the Privy Council and the High Court's decree was reversed. But the assignee was not made a party to the appeal, and when the successful appellant in the Privy Council applied for restitution, the High Court held there was no provision for ordering restitution against the assignee. It must be confessed that there is no specific provision in the Code itself for restitution in the case of a Privy Council decree. And it has been held that the Court has an inherent jurisdiction to order restitution. *Rodgers* v. *Comptoir D'escompte de Paris*, L. R., 3 P. C. 465, and *Gooroo Doss Roy* v. *Stephens*, 21 W. R., 195, S. 610, of the Civil Procedure Code directs that the courts here should execute the order of the Privy Council in accordance with the rules relating to the execution of decrees. And this may be done against the representatives of parties, restitution being also execution, it will be an order against the representative. The assignee of the decree-holder in the High Court is his representative and it seems to us just that execution should be had against him. The appellant before the Privy Council was not bound to make the assignee party to the appeal. The High Court's decree having been set aside, the assignee is bound to refund in execution by way of restitution. To hold otherwise would be denying relief to the successful man altogether; for S. 244 may bar a separate suit. The question is not free from difficulty, but we are inclined to think the High Court's view is open to question.

SUMMARY OF RECENT CASES.

Jains settled in Belgaum, applicability of Hindu Law to—Jain of Dassa Porwad caste governed by general Hindu Law—Hindu Law, general, applies to the three regenerate classes—Hindus, division of, into four classes—Vaishyas—Hindus carrying their law with them when settling out of their country—Illegitimate sons, rights of, amongst the three regenerate classes and amongst Sudras, Sudras, law as to.

Bapuchand v. Govind.

A Jain of the Dassa Porwad caste, settled in the Belgaum District from Gujerath, is governed by the general Hindu Law applicable to the three regenerate castes, *viz.*, Brahmins, Kshatriyas and Vaishyas, being not a Sudra, but a Vaishya by origin, and as such he carries his law with him from Gujerath to the Belgaum District. Under the ordinary Hindu Law, which applies to the three superior castes, to the third of which division the Jains belong, illegitimate sons do not inherit, but are entitled to maintenance only.

Illegitimate sons of Sudras are no doubt their heirs, taking with legitimate sons, daughters and daughters' sons only half the share of the legitimate sons. It does not, however, follow that in the absence of the latter they would take the whole estate to the exclusion of the widow :—*Printed Judgments of the B. H. C.* for 1898, p. 181.

Partition, suit for, limitation as to, when part of estate in exclusive possession of vendee of co-parcener for more than 12 *years—Alienee from co-parcener, title of—Co-parcener, alienation by—Possession, exclusive of alienee of co-parcener—Undivided estate—Joint family property, partition of—Limitation Act* XV *of* 1877, *Schedule II, Articles* 126, 127 *and* 144.

Bhawrao bin Mahimajirao Mhadik *v.* Bakhmin kom Raghojirao bin Tulajirao Kadam.

When some members of a joint Hindu family sell or mortgage to their respective alienees certain defined and distinct portions of the estate which have been in their exclusive possession and put the latter in possession of the same, the possession of the alienees becomes adverse to their respective alienor and their co-parceners also. It does not affect the question even if the alienees know that the lands they have purchased formed part of an undivided estate. A person coming in under a title which he knows to be defective, or even a trespasser is not by reason of his knowledge, deprived of the benefit of the law of limitation. In such a case Article 144 of the Limitation Act applies and a claim for partition of such lands, which have been in the possession of vendees and mortgagees and holders under alleged purchases, for more than 12 years, is barred by limitation. Article 127 which deals with the limitation applicable to joint family property does not apply to such a case.

Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested whether in a single person or many jointly :—*Printed Judgments of the B. H. C.* for 1898, p. 170.

Hindu Law as to adoption by widow of a predeceased son as against a widow of deceased Hindu—Adoption by widow of predeceased son, so as to deprive widow of deceased of her rights as heir—Widow of predeceased son, right of, to adopt—Authority to adopt—Right to adopt by older co-widow as against younger co-widow—Co-widows, adoption by—Rule as to adopted son being younger than adopting mother—Difference of age, rule as to, in adoption.

Gopal Balkrishna Kenjale *v.* Vishnu Raghunath Kenjale.

As between the daughter-in-law, being the widow of an only predeceased son living in union with his father at the time of his death,

and the mother-in-law, the widow of a deceased Hindu, the right of the latter to adopt is in every way superior, and the former has no independent right to adopt without the sanction of her father-in-law. The estate vests in the mother-in-law as heir, and unless she chooses to divest herself of this right, no act of the daughter-in-law could divest her of her rights as sole heir. The case of a younger co-widow is an exception to this rule, for the elder widow may by subsequent adoption divest her of her rights in the estate. Unless prohibited expressly or by implication, a widow in this Presidency has an implied authority to adopt. This cannot be said of the daughter-in-law, the widow of a predeceased son, who must be specially authorised by the father-in-law to make a valid adoption binding against his heirs.

The rule prescribing a difference of age in favour of the adopting mother must be only regarded as a directory rule, and not a command, the infraction of which invalidates the adoption :—*Printed Judgments of the B. H. C.* for 1898, p. 175.

Admissions by minor made in possessory suit, admissibility of, in a suit for possession brought by him after majority—Minor, admissions of—Evidence Act I of 1872, *Sections* 21, 58 *and* 65 *(b)—Evidence—Secondary evidence.*

Balaji Vasudev Habbu *v.* Rudrapa bin Mudkapa.

In a suit for possession of land by A, his admission in a possessory suit when he was a minor of its sale to the defendant by an unregistered document which requires registration does not come within the meaning of Section 65(*b*) of the Evidence Act. It can only be got in under Section 21 of the Evidence Act when ground is made for the admission of secondary evidence. A not claiming through his mother, similar admissions made by her in such suit are not in any event admissible against him. A's admission as to the effect of the document made in the possessory suit before the Mamlatdar is not sufficient to dispense with proof of the contents of the document under Section 58 of the Evidence Act ;—*Printed Judgments of the B. H. C.* for 1898, p. 179.

Gift, by Hindu, validity of, without delivery of possession—Validity of Hindu gift—Transfer of Property Act IV of 1882, *Sections* 123 *and* 127.

Bai Rambai, *v.* Bai Mani.

The Hindu rule of law that delivery of possession is essential to complete a gift has been abrogated by Sections 123 and 127 of the Transfer of Property Act :—*Printed Judgments of the B. H. C.*, p. 147.

Hindu minor—Minor, release by—Release by Hindu minor of his interest in family property in favour of his son, validity of, as against creditors—Family arrangement—Colourable transaction—Benami transaction—Statute of Elizabeth as to voluntary conveyance—Contracts by infants whether void or voidable—Ratification of contracts by minors—Consideration—Indian Evidence Act, I of 1872, Sections 21 and 38—Contcrat Act, IX of 1872, Sections 2, sub-sections (g) and (h), 10, 11, 247 and 248—Transfer of Property Act, IV of 1882, Section 197—Indian Trusts Act, II of 1882, Section 7.

Sadashiv Vaman Dhamankar v. Trimbak Divakar Karandekar.

In 1887 W, an adopted son, executed an instrument styled a release in favour of his minor son S represented by his aunt, the adoptive sister of W releasing the whole of the immoveable and moveable property of W which had descended to him from his adoptive father in favour of S. W was in law a minor when he executed the release. A creditor of W sued him after attaining majority seeking a declaration that certain property which he had attached was the property of W. *Held* in second appeal that the execution of the deed being admitted and it having been registered, the burden of proving that it was invalid lay upon the plaintiff, who could only succeed by showing that the release was made in favour of S with the intent of actually conveying the share of W to S but with the further intent to delay, hinder, and defraud W's creditors within the meaning of the Statute of Elizabeth. In India where the *benami* system is common there may be a sham conveyance which though registered and delivered to the grantee not being intended to pass the property, but merely to be used as a blind to deceive creditors or others, conveyed no estate to the nominal grantee. *Held* that the circumstances in this case that the then existing debts of W were all paid off by S at or about the time when the release was executed and as part of the same transaction; that the release was registered and publicly notified throughout the District, that its openly avowed object expressed in the instrument itself was to protect the ancestral estate from the consequences of W's imprudence and extravagant habits, precluded the idea that *if intended to be operative between the parties to it as a release*, it was executed for the purpose of defeating, hindering or defrauding creditors. *Held* also that the evidence given by W in certain certificate proceedings instituted by him after attaining majority must be left out of consideration in this case as not being evidence under Section 38 of the Evidence Act, and being in the nature of admissions in W's own interest, could not be used in his favour nor in

favour of the plaintiff who claimed through him. Evidence Act, Section 21. That the release in question could be supported as a family arrangement. That the circumstance that a voluntary family settlement like the one in question was without consideration, other than the covenant to provide W with maintenance while he lived in the family house and Rs. 15 per month if he was not satisfied with the maintenance provided for him, did not afford any evidence that it was not the intention of W and S that the release should be acted upon. That apart from the Contract Act a release by an infant in the nature of a conveyance would be voidable and not void. That it was open to question whether the Contract Act (apart from the Transfer of Property Act which did not apply to the case) affected the question, which appeared it did not. That there was evidence in the case to hold that W did not raitfy the release :—*Printed Judgments of the B. H. C.* for 1898, p. 149.

Partition, suit for, by purchaser, will not entitle defendants who do not so claim, to have their shares divided off and allotted to them or the Court to decree general partition—General partition, Court cannot decree if defendants do not ask, in suit for partition of his share by purchaser—Second appeal—Purchaser, suit by, for partition of his share.

Murarrao Zimajirao Dalvi *v.* Sitaram Keshav Pendse.

Plaintiff sued as a purchaser to obtain by partition the share he had purchased, valuing his claim at the value of that share and paying Court-fees on it. The defendants who represented the family did not claim their shares and ask for them to be allotted to them. *Held* that though it was no doubt open for each and every one of the defendants to have asked to have his share divided off and allotted to him, in which case he would have had to pay Court-fees according to his claim, it was not compulsory on him to have done so, still less the Court was bound, in the absence of any such request, to have determined what was the share of each of the defendants and to have allotted him that share and compelled him to take it by making a general partition. The Court in second appeal refused in such a case to accede to the prayer of some of the defendants, who did not appear in the Court of First Instance, to have the shares thus found as theirs to be divided off and allotted to them :—*Printed Judgments of the B. H. C.* for 1898, p. 132.

Court-fees, payment of, by defendant, to be given his share in partition suit—Mussulmans, suit by, for partition of joint inheritance, not distinguishable in this Presidency from partition suit by Hindus—Partition suit—Inheritance—Administration-suit, payment of Court-fees, in—Relief to defendant, on payment of Court-fees.

Abdul Kadar *v.* Bapubhai Valad Sheik Inam.

In a suit by Mussulmans for partition of an inheritance, the joint property of the parties, the lower Court refused to give one of the defendants, though he asked for it, his share which was found and admitted to be a third. The First Court refused because the Court-fee paid was only sufficient to cover the plaintiffs' one-third share in the property, and the lower appellate Court on the ground that this was not a suit for partition of joint-family as known to Hindu law. The High Court in second appeal holding that in this Presidency a suit for partition of an inheritance by Mussulmans is hardly distinguishable from a partition suit by Hindus, and the First Court having declared the property to be the joint property of the parties, the principles of an ordinary administration-suit ought at any rate to be applied to it awarded the defendant his share to be ascertained and given to him in execution on payment by him of the necessary Court-fees;—*Printed Judgments of the B. H. C.* for 1898, p. 135.

Landlord and tenant.—Covenant running with reversion—Specific devisee and general estate.

Eccles v. Mills, [1898—A. C. 360.]

The question in this case was whether a sum of money recovered by a lessee from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought to have been charged against the specific devisees of the farm or should be paid out of the general estate of the lessor. J demised to B a farm of 4,000 acres known as M, for fourteen years. The lease contained a covenant by the lessor for himself his heirs executors, &c., in the following words: "The lessor, his heirs or assigns will, at his or their own expense, within a year completely finish laying down in good English grass thousand acres of the farm." The covenant was accompanied by the following declaration at the end of the lease. "It is hereby declared that there shall not be implied in this lease, any covenant or provision whatever on the part

of either of the parties thereto." Z died without performing the covenant within the year, and by his will, he divided his property among his children. The farm M. had come to the appellants under a voluntary conveyance and the respondents represented the interest in the testator's residuary estate. At the end of the year, B claimed and got compensation from the executors for breach of the covenant in question. A dispute then arose as to the liability of the owners of the reversion in M to pay this amount. Their Lordships of the Privy Council reversing the decisions of the courts below, held that the covenant was qualified and controlled by the declaration, that, it was not in itself a charge on the reversion and not being one incidental to the relation of landlord and tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor.

Covenants running with reversions are of two kinds: (1) where the covenant is a burden or a charge on the reversion; (2) where the covenant is in its nature incidental to the relation of landlord and tenant. At common law no covenant ran with the reversion until modified by a statute of Henry VIII which provided that lessees shall have a like action against alienees of the reversion for any condition or covenant expressed in the lease. The statute was passed for the protection of tenants and gives the lessee a remedy against the lessor's assignees of the reversion in addition to the one that he possesses against the lessor's general estate. Further, of these covenants that run with the reversion the burden of those that are incident to the relation of landlord and tenant should be borne by the devisee, as between him and the testator's estate. We thus see that (1) if the covenant was a charge on the reversion, the specific devisee must always bear the burden of it; (2) if it was not a charge but was only a covenant running with the reversion and incidental to the relation of landlord and tenant the devisee has ultimately to bear the burden of it, though the lessee may proceed against the specific devisee as well as against the general estate; and (3) if it was neither a charge nor one connected with the relation of landlord and tenant the specific devisee was not liable for breach of it, the general estate being alone responsible. Their Lordships held in this case that the covenant in question did not fall under either of the first two headings above mentioned, but was a thing to be done preparatory to the complete establishment of the relation of landlord and tenant and that the burden of such a covenant should, therefore, be borne by his general estate rather than by the specific devisees.

Vendor and purchaser.—Conditions of sale—Defective title.

In-re **Deighton and Harris's Contract,** [1898—1 Ch. 458 C, A.]

The mortgagee of certain leasehold premises contracted to sell them by a deed of sale. The deed of sale contained a provision to the effect that if the purchaser should make any objection or requisition whatsoever "as to the title particulars, conditions or any other matter or thing relating or incidental to the sale, which the vendor is unable or unwilling to comply with the vendor. . . . . the vendor shall have full power to annul the sale." It turned out on the investigation of the title by the purchaser that the vendor was holding by a sub-demise the legal estate in which was outstanding in another sub-mortgagee said to have been paid off. The purchaser, therefore, insisted that the person having the legal estate should join the conveyance. The vendor being unwilling to comply with the requisitions of the purchaser, it was held by the Court of Appeal reversing the decision of *Kekewich*, J., that under the condition above mentioned the vendor was entitled to annul the sale. The condition in their opinion extending to a matter of conveyance as well of title. On the purchaser relying on the case of *Bowman* v. *Hyland*, 8 ch. D. 588, their Lordships distinguished that case as one in which the vendor had no title whatever and held that the ordinary conditions of sale giving the vendor a power of recision applies only where he has some title and not where he has none.

Specific performance.—Laches—Return of Deposit—Lien for Deposit.

Levy v. **Stogdon,** [1898—I Ch. 478. *per Stirling J.*]

Where a deposit is made by a purchaser the deposit is not merely a part payment of the purchase money but constitutes a security for the completion of the purchase so that if the purchaser fails to perform his part the vendor may retain it. It is sometimes said that facts which will induce a Court to refuse specific performance to a purchaser would entitle the vendor to retain the deposit—but the rule more accurately stated seems to be that, in order to enable the vendor to retain his deposit there must be acts on the part of the purchaser which not only amount to delay or other cause sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. On the other hand, if the vendor fails to perform the contract on his part the latter may, in the absence of a stipulation to the contrary recover the deposit from the vendor and further has a lien on the subject matter of the contract.

In 1886 A. a vendor contracted to sell a contingent reversionary interest free from incumbrances, and the purchaser paid a deposit on the purchase money. The reversion, however, proved to be incumbered and before the incumbrances were discharged, the vendor was adjudicated a bankrupt in 1888. In the same year the bankruptcy was annulled and under a composition deed the whole of his property was sold by his trustee. In 1891, the purchaser also became a bankrupt having previously sold his interest under the contract to P. who subsequently assigned it to B. In 1895, the reversion fell into possession and B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser. *Stirling* J. held: (1) that the delay was a bar to any claim for specific performance: (2) that B. had a lien for the deposit and that he can enforce his lien as no statute of limitations apply to the case.

Abandonment of quantum meruit.

Sumpter v. Hedges, [1898—1 Q. B. 673, C. A.]

In this case the plaintiff a builder had contracted with the defendant to build upon the defendant's land two houses and stables for a lump sum of £ 565. After the plaintiff did part of the work and had received the payment of part of the price, he informed the defendant that he had no money and was not willing to go on with the work and thereby virtually abandoned the contract. The defendant thereupon finished the building on his own account using for that purpose certain building materials which the plaintiff had left on the ground. The plaintiff now sued for work done and for materials supplied by him. The Court of Appeal held following *Munro*, v. *Butt*, (1858 8. E. & B. 738, that the plaintiff could not recover.

The law is, that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. There are, however, cases where money can be recovered for work done as on a *quantum meruit*, but in order that that may be so, there must be evidence of a fresh contract to pay for the work already done. If in this case the plaintiff had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract and the defendant had then proceeded to finish the work himself the plaintiff would be entitled to recover on a *quantum meruit*. Further there are cases in which though the plaintiff has abandoned the performance of a contract it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from

the defendant's having taken the benefit of that work. But in order that that may be done the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only in such cases that the inference of a new contract may be made from the defendant's taking the benefit of the work done; but where there is no such option as in the case now under consideration one must look to other facts than the mere taking of the benefit of the work in order to ground the inference of a new contract.

Covenant in lease—Meaning of the term assigns.

Bryant *v.* Hancock & Co., Limited, [1898—I, Q. B. 716 C. A.]

The plaintiff demised by lease to J. B., and his assigns a hotel for a term of twenty-one years. The lease contained a covenant that neither the lessee nor his assigns, executors or administrators shall wilfully do or suffer any act or thing which may be a breach of the regulations established by law for the conduct of licensed public houses or be a reasonable ground for withdrawing or withholding the licenses for the sale of spirituous liquors. After some years J. B., assigned the residue of the term to the defendants who sublet the premises to one Mrs. E. for a short part of the term vested in them. Mrs. E. was convicted by the Magistrates for having on one occasion permitted drunkenness on the premises and in consequence the justices refused to regrant the licenses in respect of the premises. The plaintiff thereupon sued the defendants for damages for breach of the covenant and at the trial of the suit before *Lawrence*, J., the plaintiff obtained a decree. On appeal, however, the Court of Appeal held, reversing the decision of the lower Court, that the term 'assigns' did not include an under-lessee and that the defendants were not liable for things done by the under-lessee.

An assurance for a period less than the whole term is an underlease and not an assignment. (*Oottee v. Richardson* 1853, 7. Ex. 143.); an assurance purporting to be an underlease, if it comprises the whole term, may be an assignment: [*Langford v. Selmes*, 1857, 3. K. and J. p. 220 *Beardman* v. *Wilson*, L. R., 4 C. P., 57]. A covenant not to assign is not broken by the granting of an under-lease. [*Crusoe v. Bugby*, 1, 771, 3, Wils. 234].

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Un-reported Decisions of the Privy Council from 1876—1896, compiled by Baldeva Ram Dave Bar.-at-Law, Allahabad, printed and published by the Manager, Indian Press, Allahabad.

The Albany Law Journal for June and July (*in exchange*).

The Calcutta Weekly Notes for July (*in exchange*).

The Allahabad Weekly Notes for July (*in exchange*).

The Green Bag for July (*in exchange*).

The Canadian Law Times for June (*in exchange*).

The Canada Law Journal for June (*in exchange*).

The Educational Review for June and July (*in exchange*).

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Value of Dissenting Opinions:—The discussion of the value and expediency of dissenting opinions is by no means ended yet. Indeed, such discussion seems to spring up perennially, showing at least a very decided and significant amount of vitality and energy on the part of those who oppose on principle the policy of permitting the publication of the views of the minority of a legal tribunal on a given question or series of questions. Some trenchant remarks have been made on both sides of the controversy. Perhaps the strongest argument against dissenting opinions is that based upon the principle that a decision should be that of the court and not of the judges as individuals; that it is a maxim of the law that it is to the interest of the public that there should be an end to litigation, in which view it is to the advantage of the public that when a question is settled by the highest tribunal it should remain settled for all time; that a dissenting opinion, if well written, impresses not only the particular litigant, but all who read it, with the idea that injustice has been done by the courts, thus weakening them in the popular esteem. While there is more or less force and truth in these views, we most decidedly dissent from the proposition that "a question once settled should remain settled for-ever." That depends, or ought to depend, upon whether it is settled right. It has been truly said by our contemporary, the New York Law Journal, that "it can do no real injury, and may often be productive of substantial good, for the courts to furnish the reasons for dissents. If they are weak and unconvincing,

they only serve to strengthen the authority of the prevailing opinion. If, on the other hand, the weight of argument is with the dissenters, the dissenting opinion will have most important bearing upon future cases involving the same or closely similar issues." We may add that in our opinion the publication of dissenting opinions not infrequently prevents injustice being done by showing to the profession and to the public that the majority is wrong. We have in mind several recent instances in which, according to the consensus of opinion of the members of the profession, the dissenting opinions are right and those of the majority clearly wrong. It is evident that without the publication of the dissent and the reasons therefor the errors of the majority would have gone unexposed at least for a much longer time. Thus, in our view, the publication of dissenting opinions, so far from keeping the law unsettled, tends directly to settle it, and to settle it right. True it is that upon the respect of the people for the courts depends to a large extent the very life of the Republic; but the idea that even our judges are infallible has long since gone into eclipse, together with that other played-out notion that the king can do no wrong. While majorities are doubtless more often right than wrong, minorities have rights which majorities are bound to respect; and among these rights is or ought to be the privilege of making known to the world the reasons for the faith that is in them. Thus the precious spark of truth will be struck out on the anvil of free discussion.

Dissenting opinions are clearly in line with an untrammelled press, and thoroughly in accordance with the genius of our free institutions :—*The Albany Law Journal.*

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An Innovation in Jurisprudence.—For the introduction of an important innovation in jurisprudence we are indebted to the Supreme Court of the State of Washington. It is quite within the possibilities that that breezy section of our vast country, sometimes referred to as "wild and woolly," may be able to teach us of the "effete" east something of value in legal methods and procedure. The incident referred to occurred in connection with the determination by the Supreme Court of Washington of the constitutional validity of legislation prohibiting "gold clauses" in contracts. A provision in a statue relating to debtors and creditors declared that a contract stipulating for payment in gold coin should not be specifically enforced by the courts of the State, but that the debt in such cases "might be fully satisfied by and with any kind of lawful money or currency of the United States." Recognizing the great importance of the questions

involved, and being extremely anxious to decide them right, the members of the Supreme Court hit upon the plan of supplementing the able and elaborate arguments of counsel on opposite sides by inviting the leading lawyers of the State who were not professionally connected with the case to submit briefs setting forth their several opinions and arguments. This method of eliciting the honest and impartial views of the best legal talent of the commonwealth with the view of assisting the court to reach a right conclusion, we believe is unprecedented, but we see no reason why it should not be resorted to by the courts of other States in cases of equal importance. Such procedure, besides exhibiting a commendable desire on the part of the court to get right and to do right, seems well calculated to throw all light possible upon a given case, and on the assumption that in the multiplicity of counsel there is wisdom it should prove valuable. It may be added, incidentally, that the decision in the case referred to was adverse to the so-called Gold Law, the court basing its opinion upon the conviction that the statute was an attempt to legislate on a subject belonging exclusively to the Federal government. This is sound and probably sufficient, but a conclusion adverse to the law might also have been reached on the ground of unwarrantable interference with, and restriction of, the freedom of contract—something which even congress would have no power to do. It would probably be held that individuals might make contracts providing for payments in any form of currency, and since no private stipulation can raise or lower the value of any kind of money, a clause calling for payment in gold would seem to be clearly legal.—*The Albany Law Journal.*

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Will a so-called spiritualistic medium be justified in assaulting one who interrupts his seance? is a question which the Supreme Court of Michigan was called upon to decide recently, in the case of *People* v. *Hughes*, reported in 74 N. W. Rep. 309. It appears that the complaining witness had been invited by a "medium"—and he seems to have been only a medium sort of medium—to go to his house to investigate his methods. The lights were turned out and the "dark circle" formed in the old, familiar way. The medium was tied to a chair, and his visitor sat behind him. The chair appearing to move, the visitor put out his foot to touch it. Then he lighted some matches, which not only frightened away the spirits, but caused the medium's anger to rise to such a degree that he immediately fell upon the luckless and indiscreet visitor, whom he threw to the floor and choked. The Court, after wrestling with the problem for a while, held that in spite of the rule

allowing a householder to eject a guest who misbehaves himself, the medium had no right to make an assault upon a visitor, and a conviction of assault and battery was sustained.—*The Albany Law Journal.*

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Proximate Cause of Accident.—An important and interesting discussion of the question of proximate cause of accident is contained in the prevailing and dissenting opinions of the New York Supreme Court, Appellate Division, First Department, in the recent case of *Lawrence E. Story, Admr., etc.* v. *The City of New York.* The plaintiff brought the action to recover damages for the death of his son Joseph, aged eight years, who was run over by a butcher's cart in East One Hundred and Tenth Street. The liability was predicated upon the presence of a mound of earth six or seven feet high in the street, which plaintiff claimed so obstructed the view of the child and the driver of the cart that they could not see each other. This mound consisted of earth taken from an excavation in front of the premises No. 220, and, as alleged in the complaint, was thrown from the excavation into the street, and negligently allowed to remain there, and had so remained as alleged for two weeks prior to the date of the accident. On the trial the case was dismissed before any evidence had been taken, and the judgment of dismissal has now been affirmed by the Appellate Division, in an opinion by Justice O'Brien. According to the plaintiff's allegation, the boy was attending a school which was fifty feet away from this excavation and on the same side of the street. Justice O'Brien said the city's liability rested upon the determination of the question whether the mound of earth was the proximate cause of the accident. "It is urged with much force," Justice O'Brien said, "that in the present case there were two efficient causes; one the presence of the mound of earth, which prevented the boy from seeing the horse and cart, and the other the horse and cart themselves; and that both were proximate causes of the accident. As we have already said, if the boy had tripped and fallen because of the mound, and then had been run over, this reasoning would be sound. But the mere presence of the mound, and the fact that it compelled the boy to pass around it, without the intervention of some other cause, would not have produced the accident. We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former a defendant may be liable; for the latter he will not. * * * The relation of the mound to the accident was that it obstructed vision; but this, as we have said, was not a fact which alone could

have injured the plaintiff, the cart intervening as an independent force and causing the injury." This opinion was concurred in by Presiding Justice Van Brunt and Justice Ingraham. Justice McLaughlin gave a dissenting opinion, which was concurred in by Justice Patterson. Justice McLaughlin said the defendant permitted the incumbrance to remain in the street, and this being an unlawful act on its part, it must be held responsible for the natural proximate consequences resulting therefrom. In their opinion, whether the death of the intestate was due to and resulted from the defendant's unlawful act was under the facts stated in the complaint and counsel's opening, a question for the jury. This view seems to us clearly the right one, and we believe the Court of Appeals will so hold when it comes to pass upon the question. The majority opinion embodies a refinement of reasoning which is very difficult to follow.—*The Albany Law Journal.*

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Rights of Passengers holding transfer tickets. The Appellate Division of the Supreme Court, sitting at Brooklyn, in the suit of John Jenkins against the Brooklyn Heights Railroad Company, laid down some important rules with reference to the rights of passengers holding transfer tickets. Jenkins, the plaintiff, received a transfer authorizing him in the usual way to take a Fulton street car at the corner of Court and Montague streets, within ten minutes of the time the transfer was issued. He was a sufferer from hernia, and was compelled, therefore, to take a car wherein he could have a seat. The first car which came along did not stop at all; the second stopped, but was so full that passengers were standing in the aisle; the third had vacant seats, and Jenkins boarded it, but the conductor, after taking up the transfer, notified him that the time limit had run out, and called his attention to the rules of the company posted in the car. He demanded a new fare, which was refused, and Jenkins was thereupon ejected from the car by a policeman acting on the orders of the conductor, and was arrested and taken to the Police Court, where he was afterward discharged. The question presented, said the court, was whether the plaintiff had a right to be in the car. It was held that he had. Section 104, chapter 676, of the Laws of 1892, provides that "every such corporation entering into such contract shall carry, or permit other party thereto to carry, between any two points * * * any passenger desiring to make one continuous trip between such points for a single fare * * * to the end that the public convenience may be promoted." This, the court said, was to be liberally construed and strictly enforced.

The railroad company could not set a time for the use of the transfer regardless of the condition of the cars. The passenger was entitled to a car in which he could ride in comfort and safety. It was dicided in the case of *Willis* v. *Long Island R. R. Co.* (34 N. Y. 670) that standing room in the passageway was not proper accommodation for passengers. That part of the car is what its name indicates—a way through the car. Each passenger has a right to insist that the way shall be kept at all times open and unobstructed. The company cannot compel a passenger to stand in a car, instead of furnishing him a seat. Individuals may waive their rights, but the fact that thousands do so every day does not justify the company in establishing rules to make them do so. If the company provided suitable cars, with sufficient room so that the passengers could have seats, there could be no doubt that the plaintiff must take the first car which came along, as the transfer provided for a continuous trip, and the good faith of the passenger would be established in that way. It was decided in the case of *Hanna* v. *Nassau Electric R. R. Co.* (16 App. Div. 137) that "a transferred passenger has not necessarily the right to board the first car that approaches on the line, regardless of whether there is accommodation for him. * * * His duty was to wait till a car approached in proper condition to receive him. If none came he could maintain his action against the company for breach of the contract to carry him."

The transfer ticket given to the plaintiff could not modify the original contract entered into the time of paying the fare, nor did the plaintiff in accepting it waive any rights which he had under the original contract, since he had to accept that or none at all. The lower court was not justified in excluding the testimony as to the arrest, transporation in a patrol wagon, and subsequent discharge of the plaintiff. If the arrest was made upon the order of the conductor it was part of the act of ejectment, and the jury should be allowed to consider it in estimating the damages which the plaintiff suffered.—*The Albany Law Journal.*

REVIEWS.

Privy Council Judgments not reported in the Indian Law Reports, compiled by Baldeva Ram Dave, and published by, *The Manager, Indian Press, Allahabad.*—We congratulate Mr. Baldeva Ram Dave for this very useful publication. There are many interesting and useful judgments of the Privy Council reported in this volume to

which the practising lawyer has no other means of access. Several of the judgments, however, deal only with questions of fact and should not have been included in this volume. The language of the head notes is not altogether happy in some places. But they represent accurately the points decided. The appendicies at the end of the volume giving cross-references to the several reports in which a particular decision may be found, are very valuable. The book is well got up and deserves to be in the hands of every practitioner.